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91-202

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

JAMES E. TOLLESON,
Petitioner,

v.

STATE OF ARIZONA, ex rel. ROBERT K. CORBIN,
Attorney General, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION ONE

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QUESTIONS PRESENTED

1. Will the First Amendment tolerate the reversal, and heavy penalization, of 102 sales of a "core speech" product, solely upon a showing of instances of misleading "commercial speech" about the "core speech" product, when (a) there is no showing that the author to be penalized intended to mislead the purchasers; and (b) there is no showing that any purchaser relied upon the misleading "commercial speech" statements in choosing to purchase the "core speech" product?

2. Was the grant of summary judgment upon a "wilful" violation of state consumer fraud laws permissible under the First Amendment, when it was the "law of the case" that the seller of the "core speech" product did not intend to mislead, and the allegation of "wilfulness" was only raised on remand, with no opportunity afforded to rebut it?

3. Did the award of fees to the Attorney General of Arizona for procuring and defending an injunction violative of the First Amendment itself offend the First Amendment?

LIST OF PARTIES

The parties to the proceeding below were the petitioner James E. Tolleson, and Success Education Training Company, a non-incorporated sole proprietorship of James E. Tolleson. The respondent below was the State of Arizona, by and through its (then) Attorney General, Robert K. Corbin; the present Attorney General of the State of Arizona is Grant Woods.

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PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION ONE

The petitioner James E. Tolleson respectfully prays that a writ of certiorari issue to review the decision of the Arizona Court of Appeals, Division One, entered August 22, 1991.

OPINIONS BELOW

The decision of the Arizona Court of Appeals for which review is sought is not reported. It is reprinted in the appendix hereto.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Arizona Court of Appeals, Division One, is invoked under 28 U.S.C. Section 1257(3). The decision was entered on August 22, 1991. A timely Motion for Reconsideration was denied by the Arizona Court of Appeals on October 22, 1991. A timely Petition for Review was denied by the Arizona Supreme Court on March 19, 1992, and this petition for certiorari was filed within ninety days of that date.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

In 1985 and 1986, Petitioner was engaged in the publication and sale in Arizona of a recorded set of audio and video tapes, known as "The James E. Tolleson Future Millionaires Home Study Course On Empire Building" ("the Course"). The Course consists largely of the recorded speaking of Tolleson on the general subject of success. For reasons made clear hereinafter, the Course must be deemed herein to be "core speech" entitled to the full protection of the First Amendment.

The State of Arizona, through its Attorney General, brought suit in late 1985 against Mr. Tolleson, alleging violations of state consumer fraud and racketeering statutes with regard to the sale of the Course. The action sought an injunction against Course sales. On March 14, 1986, the state trial court, after hearing evidence regarding promises and guarantees made by salesmen about the Course, but without attempting to review its content, entered a "Preliminary Injunction Order" flatly prohibiting its sale.

This blatantly unconstitutional injunction remained in full force for over three years. Tolleson had first challenged the injunction in the trial court on First Amendment grounds even before its entry, and the appealed; the appeal was not decided until April 6, 1989. In the interim, every attempt by Tolleson to have the scope of the injunction narrowed was successfully opposed by the Arizona Attorney General. A post-entry motion to the trial court to narrow the scope of its injunction based upon First Amendment concerns was rejected on procedural grounds, and the rejection was sustained by the Arizona Court of Appeals. *State v. Tolleson,* 153 Ariz. 376, 732 P.2d 1114 (App. 1986). A

"Petition For Special Action" (i.e., a writ of mandamus) to the Arizona Supreme Court, *Tolleson v. Superior Court*, No. CV-86-0247-SA, was rejected when the Court, in its discretion, declined jurisdiction, after oral argument but without reaching the merits. Tolleson's effort to obtain relief narrowing the injunction from the United States District Court was denied upon the basis of abstention. *Tolleson v. Corbin*, No. CIV 86-1610-PHX-PGR (D. Ariz), Order filed December 8, 1986.

Also while the appeal from the preliminary injunction was pending, the state court action continued. In these proceedings, Tolleson never contested — he conceded — that unfortunate statements and "guarantees" concerning the Course had been made by sales agents to prospective purchasers; he denied, however, that he had authorized such statements and that the statements had been relied upon by any particular purchaser. In his Affidavit opposing summary judgment Tolleson stated, among other things:

> "5. I have *never* promised or guaranteed to anyone that *simply* purchasing the Course would make them millionaires or assure them of quick and substantial increases in earnings. I have never instructed or permitted anyone else associated with Success Education Training Company to do so. In order to prevent that from happening, one of the steps I took was to develop and use the disclaimers in paragraphs 3 and 4 of the purchaser's order form. I have never known any representative of the Company to make any such promises and, if I had, I would have promptly and clearly repudiated the claim." (Emphasis in original.)

The trial court nevertheless granted summary judgment of liability for consumer fraud and racketeering. Thereafter, it considered the Attorney General's motions for damages, based upon 102 Affidavits of dissatisfied purchasers. Although the Attorney General characterized these 102 individuals as "victims," many had apparently been satisfied purchasers of the Course until the Attorney General showed them, and discussed with them, the unconstitutional injunction. Most of the 102 Affidavits actually included, as an attachment, Tolleson's Order Form, signed by the respective affiant. The Order Form recited disclosures of Mr. Tolleson's past history of legal problems, acknowledged

that the prospective purchaser had audited at least 12 hours of the Course before purchasing, and also contained the following disclaimers:

> "No promise or guarantee as to a specific amount of money which shall be made by me, as a result of this Course, has been made.
>
> I understand that the term "Millionaireship" is a general term, representative of the goal of financial success, and is not intended to imply that I, or anyone else, will necessarily become a millionaire as a sole result of buying this course."

Nevertheless, the trial court accepted all Affidavits, and, in a series of further orders, without further evidentiary proceedings, quantified Tolleson's liability in the amount of $492,814.40, based upon expenses of 102 disgruntled purchasers of the Course, trebled that amount under the State's racketeering laws to $1,478,443.20, rendered the preliminary injunction permanent, declared forfeit all equipment (i.e., recording devices) used to manufacture the Course tapes, and awarded attorney's fees in favor of the State in the amount of $148,345.03.

Appeals from each of these rulings were consolidated with the appeal from the preliminary injunction, and resolved in a published decision, *State v. Tolleson*, 160 Ariz. 385, 773 P.2d 490 (1989) (*"Tolleson I"*). In *Tolleson I*, the Arizona Court of Appeals, Division One, noted that the State had never introduced the Course into evidence and, indeed, had successfully opposed Tolleson's efforts to do so. Since the trial court had never reviewed the content of the Course, the Arizona Court of Appeals found the 3-year-old injunction unconstitutional:

> "To justify an outright ban of publication on the entirety of Tolleson's course, the State was obliged to prove (1) that the course was wholly commercial and (2) that it was wholly deceptive. ***This burden the state did not carry.*** To justify a partial ban, the state was obliged to prove that extricable components of the course were wholly commercial and wholly deceptive. ***This burden the state did not attempt to carry.***
>
> * * *

> We conclude that the preliminary and permanent injunctions were unconstitutional."

(160 Ariz. at 389, 397; emphasis added.) The court, having noted that Tolleson did not dispute that "deceptive and fraudulent sales techniques and advertising" had been used (160 Ariz. at 388), then proceeded to affirm summary judgment for the State with regard to Tolleson's liability for state consumer fraud:

> "Reliance is not an element of consumer fraud.
>
> * * *
>
> Because Tolleson's promotions and advertisements were concededly deceptive commercial speech, they lacked First Amendment protection and, like any alleged form of consumer fraud or racketeering, were actionable without a showing of reliance. . . . We similarly reject Tolleson's claim that the First Amendment requires a showing of specific intent to deceive in *consumer fraud* cases."

(160 Ariz. at 398; emphasis in original.) The court reversed, however, summary judgment on the racketeering charge:

> In the absence of undisputed evidence of the requisite intent, we find an insufficient basis for the trial court's grant of summary judgment on the charge of racketeering.

(160 Ariz. at 388-89.) Finally, the court reversed the forfeiture of Mr. Tolleson's equipment for producing the Course:

> We need not address Tolleson's First Amendment arguments concerning forfeiture. [Footnote: *But see Fort Wayne Books, Inc. v. Indiana,* U.S. , 109 S.Ct. 916, 103 L.Ed.2d 34 (1989) (holding pretrial forfeiture of books under Indiana's racketeering statutes violated first amendment).] Because forfeiture was premised on a finding of liability under the racketeering statutes, that judgment must also be reversed."

(160 Ariz. at 389.) Thus, having set aside the unconstitutional injunctions, having affirmed summary judgment upon the issue of consumer fraud liability, and having reversed "[a]ll other orders," the Court of Appeals remanded "for further proceedings consistent with this opinion." (*Id.*)

Upon remand to the trial court, there were no new evidentiary proceedings, or any effort to have an injunction reentered. The State sought the simple reentry of the reversed judgment in slightly modified form, and urged summary rejection of all Tolleson's arguments:

> To promote [his] theory, counsel [for Mr. Tolleson] must once again pretend that his client's "course" is "core free speech." This was point-blank rejected by the Court of Appeals, which held the course to be "commercial speech". . . .

The Attorney General requested reentry of the $492,814.40 damage award derived from the 102 Affidavits, based only upon the consumer fraud (and not racketeering) theory. Mr. Tolleson objected, arguing that, while "liability" for consumer fraud for misleading statements might support, among other things, an injunction against the misleading statements, the First Amendment would not tolerate the draconian sanction of reversing and penalizing 102 sales of a "core speech" product unless, at a minimum, it was shown that Mr. Tolleson had intended to mislead the purchasers, and that the purchasers had relied upon the misleading statements in purchasing the Course. The trial court rejected the argument and reentered the $492,814.40 judgment, and the Court of Appeal, in *Tolleson II*, for which certiorari is now sought, affirmed, finding that Mr. Tolleson's arguments about the need for the State to show reliance and intent before invoking this sanction was precluded by the "law of the case" and that any distinction between the consumer fraud liability determination, on the one hand, and the damages calculations, on the other, was "irrelevant" (p. A-3, *infra*).

As noted above, the trial court had originally trebled the $492,814.40 judgment under the racketeering laws, and the Court of Appeal had reversed in *Tolleson I* when it had found that the State had failed to prove Mr. Tolleson had any "intent to deceive" as required by the racketeering statutes. On remand, the Attorney General abandoned the racketeering theory and simply requested, for the first time, a $5,000 penalty for each of the 102 Affidavits, a total of $510,000, based upon a "wilful" violation of the consumer fraud laws within the meaning of A.R.S. Section

44-1531(A). Although Mr. Tolleson argued that he was entitled to trial on the issue of "wilfulness," the trial court on remand awarded the penalty with no further evidentiary proceedings. The Court of Appeals in *Tolleson II* affirmed, finding that the trial court's determination of "wilfulness" under these circumstances "supported by the evidence" (p. A-5, *infra*).[1]

Tolleson I had reversed an award of the State's attorney's fees of $148,345.03. On remand, the State requested its reentry, reducing the request by 8%, to $137,058.55. Tolleson protested that he was being made to pay for the Attorney General's efforts to obtain and enforce the unconstitutional injunction against him. For example, Tolleson described how the Attorney General had first persuaded Judge O'Toole to ban the Course without even attempting to prove its content. Yet on April 23, 1986, when Tolleson had appeared before Judge O'Toole to urge that the preliminary injunction be modified to permit the sale of the Course under extreme restrictions, the Attorney General opposed the request, arguing as follows:

> "[Mr. Tolleson] pins his basic hopes on a sort of core speech, commercial speech dichotomy in his motions. But you can't differentiate. . . . [The Course] is laced with commercial speech. Moreover the course is inherently misleading. . . .
>
> * * * *
>
> "You notice I address the propriety of doing it, putting him out of the motivational course sales business. You can."

These statements were factually false, and legally wrong. But they were effective: Judge O'Toole concluded at the end of the hearing that "my preliminary injunction Order is proper and does not violate the First Amendment." Immediately thereafter, Mr. Tolleson had petitioned the Arizona Supreme Court to exercise its special action jurisdiction to

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[1]The original *Tolleson II* decision had also recited that "the trial court could reasonably have inferred" wilfulness on Mr. Tolleson's part (p. A-5, *infra*), but the phrase was deleted by the Court of Appeals in its October 2, 1991, Order denying the Motion for Reconsideration (p. B-1, *infra*).

modify the injunction to permit sales of the Course, under extreme restrictions. The Attorney General, opposing the request, told the Arizona Supreme Court that "Judge O'Toole found the . . . [C]ourse to be misleading and deceptive." The statement was false, but effective: the Arizona Supreme Court declined special action jurisdiction. In November of 1987 the Attorney General, opposing Mr. Tolleson's motion for a new trial, told Judge Martone that "Defendants are simply incorrect when they state that [Judge O'Toole] did not inquire into the content of" the Course. The statement by the Attorney General was necessarily, calculatedly false, but it was effective. Judge Martone refused a new trial, and rendered the preliminary injunction a permanent one. Tolleson argued that the First Amendment was violated by making him pay the legal costs associated with these arguments by the Attorney General. The trial court awarded the fees, however, and the Court of Appeals affirmed, ostensibly because Mr. Tolleson had failed to "point to any concrete examples" of being required to pay for the injunction (p. A-5, *infra*).

Although *Tolleson I* had reversed the seizure of the "printing press" (the equipment used to produce the Course), the Attorney General refused to return the equipment and, indeed, sold it over Tolleson's protest while the *Tolleson II* appeal was pending. Tolleson sought the return of his equipment, which the State had forfeited and which forfeiture had been reversed. He argued that the continued retention of his "printing press" deprived him of his First Amendment rights to produce and market the Course, and amounted to continued exploitation by the Attorney General of the unconstitutional injunction. The trial court, however, sustained the forfeiture, and the Court of Appeals in *Tolleson II* affirmed this action, denying both Mr. Tolleson's request for the return of the "printing press" and for damages (p. A-6, *infra*).

REASONS FOR GRANTING THE WRIT

I. The First Amendment Will Not Tolerate The Wholesale Reversal And Penalization Of Sales Of A "Core Speech" Product Solely Upon A Showing Of Instances of Misleading "Commercial Speech".

Tolleson II affirms the reversal, and heavy penalization, of 102 sales of a "core speech" product, solely upon Mr. Tolleson's concession that misleading "commercial speech" concerning the product was probably employed, at times. Mr. Tolleson submits that, while the misleading commercial speech can obviously be enjoined, the First Amendment will not permit the State to go further and upset and penalize the "core speech" sales without, at a minimum, showing that the purchasers of the "core speech" were actually and intentionally misled. The Court of Appeals in *Tolleson II* refused to consider the argument on the basis that it was resolved in *Tolleson I*. The "law of the case" conclusion is plainly wrong. Moreover, the underlying issue presents an important constitutional question, and needs to be addressed.

The Court of Appeals has collapsed the distinction between the product and its promotion. In *Tolleson I*, it decided (160 Ariz. at 398) that the promotion was actionable under Arizona's consumer fraud laws, without showing any reliance on the part of the purchaser or intent to deceive on the part of Mr. Tolleson, based upon the specific language of A.R.S. Section 44-1522(A) (which declares a misleading promotion to be "an unlawful practice" "whether or not any person has in fact been misled"), citing the decisions in *People ex rel. Babbitt v. Green Acres Trust,* 127 Ariz. 160, 618 P.2d 1086 (App. 1980); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557, 100 Sup.Ct. 2343 (1980); and *State ex rel. Babbitt v. Goodyear Tire & Rubber Co.,* 128 Ariz. 483, 626 P.2d 115 (App. 1981).

The Court of Appeals was correct in *Tolleson I.* Misleading sales practices can be enjoined. The problem now, however, is that neither *Tolleson I* or *any* of the authorities upon which it relied went further and discussed *penalties* beyond an injunction against misleading sales practices.

Indeed, none of the authorities cited in *Tolleson I* even involved an underlying product that was itself core speech.

In *Green Acres Trust,* the Attorney General had brought suit challenging the sale of prearranged funeral plans under the consumer fraud laws, and the trial court had dismissed the action on the theory that the sale of such plans was regulated by other, more specific, legislation as well as by state agencies including the Board of Funeral Directors and Embalmers, and that, therefore, a consumer fraud action would not lie. The Court reversed the dismissal of the complaint and reinstated the action, concluding that misrepresentations surrounding the sale of prearranged funeral plans (i.e., not a "core speech" product) could constitute an "unlawful practice" within the meaning of A.R.S. Section 44-1522(A), which would then "entitle the Attorney General to seek the remedies set forth in A.R.S. Section 44-1528(A)". (127 Ariz. at 167; footnote omitted.) The *only* remedy that the Court specifically discussed in *Green Acres Trust* was injunctive relief, noting that an injunction would be proper if the "unlawful practice" were established "even though a past wrong forms the basis for the injunction and there is little indication that the wrong will be repeated." *(Id.)*

Similarly, in *Goodyear Tire,* where the underlying product were automobile tires, the *only* issue in the case was whether an advertisement could be enjoined. The Court held, in effect, that a misleading advertisement could be enjoined even if the seller had not intended that the advertisement be misleading. It did not discuss further remedies under the Consumer Fraud Act beyond the matter of halting the advertisement.

The *Central Hudson Gas* decision involved the right of a utility to advertise to promote the use of electricity. The underlying product was electric service. The only issue was whether or not such advertising could be prohibited, based upon the Commission's concern for energy conservation. This Court concluded that it could not be.

There is obviously a huge distinction, of which the Court of Appeals has lost sight, between enjoining a misleading sales practice, on the one hand, and reversing and penaliz-

ing a transaction for the sale of a "core speech" product, on the other. *Central Hudson Gas* itself addresses the extreme care that must be taken in this area:

> "Moreover, the regulatory technique [to be applied to commercial speech] must be in proportion to [the State's] interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." (100 S.Ct. at 2350)

It was for these reasons — the need for "careful design" and the need to avoid "excessive restrictions" — that Mr. Tolleson argued that the State's interest cannot justify the reversal and penalization of a "core speech" product unless, at a minimum, actual intent to deceive as well as reliance upon a misleading statement by the purchaser is demonstrated.

Where is the "careful design" in this case? Where is the care to avoid "excessive restrictions"? It is completely missing. Indeed, the distinction between enjoining misleading commercial speech, and reversing and penalizing the sale of "core speech", is characterized by the Court of Appeals as "irrelevant". Obviously, the Court of Appeals cites no authority for this astounding conclusion.

The distinction is not irrelevant. It is of critical constitutional import. The Court of Appeals endorses the sledgehammer approach when the First Amendment requires microscopic surgery. Until it is addressed, the judgment presumptively offends the First Amendment.

II. Summary Judgment Against Mr. Tolleson On The Issue Of "Wilful Violation" Was Grossly Improper.

For the reasons stated above, the penalization of $5,000.00 per sale of a "core speech" product offends the First Amendment. In addition, the summary judgment of a

"wilful violation" offends Mr. Tolleson's rights to a jury trial under the Seventh Amendment to the United States Constitution.

It is the "law of the case" from *Tolleson I* that the Attorney General failed to prove that Mr. Tolleson had any specific intent to deceive. (160 Ariz. at 398-99.) In addition, the record from *Tolleson I* contained the Affidavit of Mr. Tolleson in which he denied knowing or authorizing misleading statements. The Order Form was signed by many, if not all, of the individuals whose Affidavits are the basis of the $5,000.00 per person penalty being affirmed for "wilfulness;" their signatures upon the Order Forms are inconsistent with the conclusion that they were misled. Mr. Tolleson's drafting and use of these Order Forms is clearly inconsistent with the conclusion that he "wilfully" made use of misleading statements by rouge salespersons.

This record, of course, was developed before "wilfulness" was an issue. The State did not assert any contention that Mr. Tolleson's conduct was "wilful" within the meaning of A.R.S. Section 44-1531 until *after* the rendering of *Tolleson I*. No new motions for summary judgment were made, no new evidence presented or permitted. On remand, the trial court simply "found", as a fact, without holding further evidentiary proceedings, that Mr. Tolleson's conduct was "wilful" within the meaning of A.R.S. Section 44-1531(A).

Mr. Tolleson is entitled, at least, to have a jury determine whether or not his actions were "wilful". The existence of a "wilful" violation of A.R.S. Section 44-1531 is a question of fact for the jury. *State ex rel. Corbin v. United Energy Corp.*, 151 Ariz. 45, 51, 725 P.2d 752 (1986). This issue has never been submitted to a jury.

In its Decision, in support of the "wilfulness" determination, the Court of Appeals observed as follows:

> "Defendant has conceded that he knew his salespersons were engaging in deceptive practices, and does not dispute receiving a profit from these deceptive practices (p. A-4, *infra*)."

The statements are untrue; they are inconsistent with his Affidavit. Mr. Tolleson conceded that his salespeople proba-

bly engaged at times in deceptive practices; at the same time, he denied authorizing the salespeople to use such deceptive practices, and the evidence in this case is that he took substantial efforts to prevent them. As far as profitability is concerned, it was never an issue herein until after the issuance of the *Tolleson I* decision, and Mr. Tolleson disputes, as a fact, that he profited from any deceptive practices.

In its concluding paragraph on the issue of "wilfulness", the Court of Appeals explicitly relied upon "circumstances under which the trial court could reasonably have inferred that Tolleson should have known...." (p. , *infra*). It deleted the reference to what "the trial court could reasonably have inferred" as a result of Tolleson's Motion For Reconsideration, but did not alter the result. This improper fact finding on a summary judgment must be reversed.

III. The Award Of Fees To The Attorney General Offends The First Amendment.

The Attorney General was awarded his attorneys' fees for obtaining and defending the unconstitutional injunction, and the Court of Appeals declined to consider whether the award itself offends the First Amendment because, it said, Mr. Tolleson did not "attempt to demonstrate any specific items to which he objects" (p. A-5, *infra*).

The Court of Appeals was flatly wrong. In Tolleson's Appellants' Opening Brief in the Court of Appeals, he described in detail three specific and egregious examples of time entries for which the Attorney General is being compensated by Mr. Tolleson.

Now Mr. Tolleson must pay for these "services" of the Attorney General. Each and every one of these actions is represented by a time entry from the Attorney General that translates, at an hourly rate, into the $138,058 award of fees included within the "Judgment On Mandate." They are representative samples of the whole; there are many, many more examples.

At a minimum, the fee award should be remanded with directions to withhold from the Attorney General compen-

sation for time devoted to obtaining and defending the unconstitutional injunction.

CONCLUSION

For these various reasons, the petition for certiorari should be granted.

Respectfully Submitted,

C. Steven McMurry
Attorney for Petitioner
James E. Tolleson

Appendix A — Memorandum Decision of Court of Appeals [Caption Deleted].

James E. Tolleson, d.b.a. Success Education Training Company, appeals from judgment entered by the trial court following mandate in a previous appeal, *State ex rel. Corbin v. Tolleson*, 160 Ariz. 385, 773 P.2d 490 (App. 1989) *(Tolleson I)*. Tolleson raises the following issues:

1. Does the judgment for damages under the consumer fraud act violate the First Amendment?

2. Is the judgment for penalties erroneous because the state failed to prove "wilful" violations of the consumer fraud act?

3. Did the award of costs and attorneys' fees to the state violate the First Amendment?

4. and 5. Did the court err by not ordering the attorney general to return the "printing press" to Tolleson and by not awarding Tolleson damages for its retention?

6. Did the court err by determining that Tolleson was not entitled to attorneys' fees?

We find that Tolleson was entitled to damages, including attorneys' fees, for reversing a wrongful injunction, and reverse the trial court's determination that Tolleson was not entitled to fees. We affirm on all other issues.

I. FACTS AND PROCEDURAL HISTORY

The factual and procedural background of the case prior to judgment on the mandate is set forth in the opinion in the prior appeal. *Tolleson I,* 160 Ariz. 385, 773 P.2d 490. In that case, we reversed the trial court's judgment granting the state an injunction against marketing the "James E. Tolleson Future Millionaires Home Study Course on Empire Building" (the "Course") or "any other motivational course." 160 Ariz. at 387-88, 773 P.2d at 492-93. We held

that the state had failed to prove that the Course was deceptive commercial speech and thus had not met the heavy burden imposed on it to regulate speech. *Id.* at 395-96, 773 P.2d at 500-01. We held that the injunction against marketing other motivational courses was a "classic prior restraint of speech." *Id.* at 396, 773 P.2d at 501. We further held that the state had failed to establish necessary elements of its claim for racketeering and reversed summary judgment on that count. *Id.* at 398-99, 773 P.2d at 503-04. As a consequence, we reversed the judgment ordering the forfeiture of Tolleson's video and audio production facilities (his "printing press"), which was grounded on the racketeering claim. However, we upheld the judgment insofar as it found the defendants liable under the consumer fraud act. *Id.* at 398, 773, P.2d at 503; *see* Ariz. Rev. Stat. Ann. §§ 44-1521 to 44-1534 (1987). We remanded for further consistent proceedings.

Tolleson filed several motions after remand. He requested an award of attorneys' fees under three theories: the "private attorney general" doctrine; Ariz. Rev. Stat. Ann. §§ 12-341.01.(C) (1982) and 12-349 (Supp. 1990); and for reversing the wrongful injunction. He also sought the immediate return of his "printing press" and damages for its alleged wrongful retention. The court denied Tolleson all the relief requested.

The trial court then entered a new judgment. It awarded the state damages in the amount of $492,814.40, the amount of the restitution claims of the 102 victims who filed affidavits in the state's previous motions for summary judgment. The court awarded the state $137,058.55, representing the state's costs and attorneys' fees incurred in the action minus Tolleson's costs in the prior appeal. Under authority of Ariz. Rev. Stat. Ann. § 44-1531 (1987), the court also imposed a civil penalty of $510,000, representing a $5,000 penalty for each of the 102 victims. Tolleson appealed from the judgment imposed.

II. DISCUSSION

A. *The First Amendment*

Tolleson asserts that in consumer fraud cases in which the product is speech in some form, the First Amendment mandates a "heightened scrutiny." He argues that this heightened scrutiny requires the state to prove both intent and reliance. Because we disposed of this argument in the previous appeal, that determination is the law of the case and governs here. *See Tolleson I,* 160 Ariz. at 398, 773 P.2d at 503; *Ziegler v. Superior Court,* 134 Ariz. 390, 393, 656 P.2d 1251, 1254 (App. 1982)

Tolleson states that the argument differs from that in the previous appeal because he now argues against calculating damages based on the victims' affidavits, while in the previous appeal he argued only against liability. This supposed distinction is irrelevant.

Tolleson concedes that the sales pitches for the Course constituted deceptive commercial speech. As we stated, in *Tolleson I*: "deceptive and misleading commercial speech lacks First Amendment protection altogether." 160 Ariz. at 398, 773 P.2d at 503 (citing *Central Hudson Gas v. Public Service Comm'n of N.Y.*, 447 U.S. 557, 563 (1980)). That protection is lacking whether the issue is liability under the consumer fraud statutes or the amount of damages to be awarded for the same violations. We have already rejected the argument; our holding is the law of the case. *See Dancing Sunshines Lounge v. Industrial Comm'n*, 149 Ariz. 480, 482, 720 P.2d 81, 83 (1986).

B. *Wilful Violation of Consumer Fraud Act*

The trial court found that defendant's conduct was "wilful" and assessed penalties pursuant to Ariz. Rev. Stat. Ann. § 44-1531(A). We find that the determination was supported by the evidence.

To obtain civil penalties under the Consumer Fraud Act, the state must prove "wilful" violations of the act. Ariz. Rev. Stat. Ann. § 44-1531. The Consumer Fraud Act in force at the time the complaint was filed in this case, and the version applicable in this action, *see* Ariz. Rev. Stat. Ann § 1-244 (1989), defined a wilful violation:

> For purposes of this section, a wilful violation occurs when the party committing the violation knew or should have known that his conduct was a violation of § 44-1522 of this article.

Ariz. Rev. Stat. Ann. § 44-1531(B)(1985). In 1986, the statute was amended and now requires that a defendant "knew or should have known that his conduct was of the nature prohibited by § 44-1522." The state argues that it need only prove that defendant knew or should have known that his conduct was *of the nature* prohibited by § 44-1522 and, thus, that no specific knowledge of the content of that section is required. In particular, the state focuses upon the requirement that the defendant "should have known" that his conduct was a violation of Arizona law. We agree with the state that defendant should have known that his conduct violated Arizona law. Thus, we do not reach the question whether former § 44-1531(B) required actual knowledge of a particular statute.

Defendant has conceded that he knew his salespersons were engaging in deceptive practices, and does not dispute receiving a profit from these deceptive practices. Further, because of his previously adjudicated violations of other states' consumer fraud laws, Tolleson had reason to know and should have informed himself of consumer fraud laws. *See Tolleson I*, 160 Ariz. at 396, 773 P.2d at 501 (citing *Commonwealth v. Tolleson*, 14 Pa. Commw. 72, 321 A.2d 701 (1974); *Commonwealth v. Tolleson*, 14 Pa. Commw. 164, 321 A.2d 713 (1974); *Americans Be Independent v. Commonwealth*, 14 Pa. Commw. 179, 321 A.2d 721 (1974)). Tolleson's knowledge of the deception, profits from that deception, and his experience with consumer fraud laws

create circumstances under which the trial court could reasonably have inferred that Tolleson should have known his conduct violated the Arizona consumer fraud statutes.

C. *Costs and Attorney's Fees for the State*

Tolleson argues that the trial court erred when it allowed the state to recover costs and fees incurred in obtaining and enforcing the illegal injunction because this offends the First Amendment. We cannot determine whether there is any merit to Tolleson's contention because he has failed to demonstrate the underlying factual premise.

After remand, the attorney general submitted an affidavit stating that all entries for costs incurred in connection with the injunction had been eliminated from the fee application. Tolleson claims that the affidavit includes time relevant only to the injunction issue. He does not, however, point to any concrete examples. In *Guard v. County of Maricopa*, the court stated: "On appeal, the appellant has the burden of demonstrating to this court that there was error committed below. And upon failure to do so, we have no alternative but to affirm." 14 Ariz. App. 187, 188-89, 481 P.2d 873, 874-75 (1971). Tolleson has not even attempted to demonstrate any specific items to which he objects; he has not met his burden of demonstrating error.

D. *Return of the "Printing Press" and Damages*

Tolleson argues that in the prior appeal, we overruled the seizure of his "printing press." He asserts that the state was required to immediately return it to him after the mandate and is liable for damages for its retention. He claims that the trial court erred by not ordering the state to do so.

Tolleson's equipment was seized pursuant to court order. After seizure, the state filed a complaint seeking judicial forfeiture under state anti-racketeering statutes. The trial court granted summary judgment for the state on the forfeiture claim, but that claim was later reversed by this court. *Tolleson I*, 160 Ariz. at 399, 773 P.2d at 504. This

court did not, however, reverse summary judgment for the state on its consumer fraud claims. *Id.* at 398, 773 P.2d at 503. Nor did we disturb the validity of the prior seizure order. *See id.* at 398-99, 773 P.2d at 503-04. Thus, at the time of remand, the state had obtained both (1) a valid order allowing it to seize Tolleson's property, and (2) a valid judgment of liability under the consumer fraud statutes. The state then obtained a judgment for money damages under the consumer fraud statutes and, finally, a writ of execution against Tolleson's property. The property was sold at a Sheriff's sale to satisfy the judgment.

We find nothing improper in these events. Tolleson alludes to improprieties in the seizure of his property and in the Sheriff's sale. He made no objection to these procedures in the trial court, nor does he point to anything on appeal that substantiates his claim for wrongful retention of property. Accordingly, we deny Tolleson's request for return of the property or damages.

E. *Attorneys' Fees*

In his post-mandate motions, Tolleson sought attorneys' fees under three theories: (1) private attorney general theory; (2) wrongful injunction; and (3) Ariz. Rev. Stat. Ann. §§ 12-349 and 12-341.01(C). We find no merit to contentions one and three and dispose of them before reaching number two.

1. Private Attorney General

Our supreme court has stated that the private attorney general doctrine permits courts in their discretion to award attorney's fees to a party who has vindicated a right that:

(1) benefits a large number of people;
(2) requires private enforcement; and
(3) is of societal importance.

. . . The purpose of the doctrine is "to promote vindication of important public rights."

Arnold v. Arizona Department of Health Services, 160 Ariz. 593, 609, 775 P.2d 521, 537 (1989) (citations omitted). We find that Tolleson has failed to meet either factor one or three. Even if he prevails, the judgment will not benefit a large number of people, and preserving his right to sell his Course is not "of societal importance."

Undoubtedly, the First Amendment is a societal issue of importance to a great number of people. But Tolleson's ability to sell the "James E. Tolleson Future Millionaires Home Study Course on Empire Building" is not: it is an issue personal to the defendants. Only that limited group would benefit from Tolleson's success in this action. In *Arnold,* by contrast, the plaintiffs achieved a judgment declaring that the state and county were required to provide community mental health services to the chronically mentally ill. 160 Ariz. at 603-04, 775 P.2d at 531-32. That relief was of societal importance and benefitted a large number of people. *Id.* at 609, 775 P.2d at 537. The same is not true here. The trial court did not err when it refused to award Tolleson attorneys' fees under this doctrine.

2. Ariz. Rev. Stat. Ann. §§ 12-341.01(C) and 12-349

To obtain fees under Ariz. Rev. Stat. Ann. § 12-341.01(C) (1982), a litigant must prove all three of its elements: (1) the claim constitutes harassment; (2) the claim is groundless; and (3) the claim is not in good faith. *Gilbert v. Board of Medical Examiners,* 155 Ariz. 169, 180, 745 P.2d 617, 628 (App. 1987). The same three elements must be proven in Tolleson's claims under Ariz. Rev. Stat. Ann. § 12-349 (Supp. 1990); *see* § 12-349(F).

Tolleson is not entitled to attorneys' fees under either of these sections. First, Ariz. Rev. Stat. Ann. § 12-349(D)[1] precludes fees against the state on its claims arising out of the racketeering allegations. Second, assuming that Tol-

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[1]"This section does not apply to the adjudication of civil traffic violations or to any proceedings brought by this state pursuant to title 13."

leson could recover fees at this point in the case,[2] he has failed to make the requisite showing under *Gilbert v. Board of Medical Examiners.* His motion for fees merely made broad, sweeping allegations that amounted to nothing more than legal conclusions. He did not attempt to prove the elements of a claim for fees. The trial court did not abuse its discretion in concluding that Tolleson had failed to prove his entitlement to fees under these statutes.

3. Wrongful Injunction

Tolleson contends that he is entitled to fees incurred to overturn a wrongful injunction. The state argues two grounds for denying these fees: (1) Tolleson should have made his fee request in the court of appeals; and (2) Ariz. Rev. Stat. Ann. § 12-349(D) precludes an award of fees against the state in this instance. The trial court also found fees inappropriate because Tolleson had succeeded only in reversing summary judgment and the state could still obtain a lawful injunction. We reject all three reasons.

Tolleson is entitled to pursue damages, including attorneys' fees, for overturning the injunction. *See State v. Williams,* 12 Ariz. App. 498, 472 P.2d 109 (1970). In that case, Williams succeeded in having an injunction reversed on appeal. He then brought a separate action against the state to recover attorneys' fees for the wrongful injunction. The trial court awarded fees and the court of appeals affirmed. It held that a party who has been subjected to a wrongful injunction may recover damages, including fees incurred to overturn the injunction, because legal services are necessary to remove an illegal restraint. 12 Ariz. App. at 500, 472 P.2d at 111. Thus, Tolleson is entitled to the damages he incurred as a result of the injunction we overturned.

Ariz. Rev. Stat. Ann. § 12-349(D) does not apply to bar Tolleson's fee recovery. That section reads: "*This section*

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[2]There is no final judgment in his favor on any issue.

does not apply to . . . any proceedings brought by this state pursuant to title 13." (emphasis added). The section simply does not address wrongful injunctions procured by the state. Rather, it protects the state from claims for attorneys' fees in action filed under Title 13 *when the fees are sought pursuant to § 12-349.* The section does not apply to bar Tolleson's claim.

The fact that the state could still seek and obtain a lawful injunction is similarly unpersuasive. The attorneys' fees recoverable in this case are part of the *damages* incurred by the party in suffering a wrongful injunction. A later lawful injunction would not redress the damages the defendant already suffered under the unlawful one.

Under *Williams,* Tolleson could have filed a subsequent action to recover damages for the wrongful injunction. He also could have sought them by motion in this action. *See* Ariz. R. Civ. P. 65.1. The trial court erred in determining that he was not entitled to them at all. We therefore remand this case to the trial court for a determination of the appropriate damages incurred for reversing the illegal injunction. We note that Tolleson is entitled to only those fees incurred in reversing the injunction, but not fees incurred in defending the rest of the action.

IV. CONCLUSION

The trial court correctly granted judgment for damages despite Tolleson's First Amendment challenge. It correctly denied Tolleson's claims for attorneys' fees under Ariz. Rev. Stat. Ann. §§ 12-341.01(C) and 12-349. It correctly refused to order the attorney general to return Tolleson's "printing press," and correctly denied damages for the state's retention of the press before sale. The court also correctly found that Tolleson acted wilfully under Ariz. Rev. Stat. Ann. § 44-1531. The judgment is affirmed in respect to these issues.

However, the trial court improperly precluded Tolleson from seeking damages, including attorneys' fees, for the wrongful injunction. That aspect of the judgment is reversed, and the cause is remanded to the superior court for further proceedings consistent with this decision.

/s/ NOEL FIDEL
NOEL FIDEL, Judge

CONCURRING:

/s/ EINO M. JACOBSON
EINO M. JACOBSON,
Presiding Judge

/s/ RUDOLPH J. GERBER
RUDOLPH J. GERBER, Judge

Appendix B — Order of Court of Appeals denying the Motion for Reconsideration [Caption Deleted].

Judges Noel Fidel, Eino Jacobson, and Rudolph Gerber have considered appellant's motion for reconsideration and appellee's response.

IT IS ORDERED revising the court's memorandum decision filed August 22, 1991, by striking the words "the trial court could reasonably have inferred" in the seventh and eighth lines from the bottom of page six. The motion for reconsideration is otherwise denied.

DATED this 2nd day of October, 1991.

/s/ NOEL FIDEL

NOEL FIDEL, Judge

Appendix C — Order of the Arizona Supreme Court denying Petition for Review [Caption Deleted].

March 19, 1992

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on March 17, 1992, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Justice Martone recused himself and did not participate in the determination of this matter.

Record returned to the Court of Appeals, Division One, Phoenix, this 19th day of March, 1992.

/s/ NOEL K. DESSAINT

NOEL K. DESSAINT, Clerk